

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NATHAN TOMMY THOMPSON,
Appellant.

No. 2 CA-CR 2013-0320
Filed June 10, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201101231
The Honorable Robert Carter Olson, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 Following a jury trial, Nathan Thompson was convicted of two counts of discharging a firearm at a structure, one count of aggravated assault, and one count of misconduct involving weapons by a prohibited possessor. On appeal, Thompson argues that the trial court erred in admitting evidence of a different assault, that insufficient evidence supported his conviction for aggravated assault, and that the trial court improperly enhanced his sentence. Because the trial court improperly enhanced three of Thompson's sentences without evidence his prior convictions were of a dangerous nature, we vacate those sentences and remand for resentencing, but otherwise affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *State v. Pena*, 233 Ariz. 112, ¶ 2, 309 P.3d 936, 938 (App. 2013). In May 2011, S.L. agreed to help Thompson and C.J. purchase marijuana. The group drove to the parking lot of an apartment complex and waited for the seller to arrive. While they were waiting, Thompson suddenly became angry, pulled out a gun and pointed it at C.J., and began "talking crap to her." S.L. and C.J. decided to leave and began walking to S.L.'s house. C.J. apparently had Thompson's wallet and, as the two women were leaving, gave it to the man who had driven them to the apartment complex and told him to return the wallet to Thompson.

¶3 Before C.J. and S.L. arrived at S.L.'s home, Thompson went there looking for S.L. S.L.'s 14-year-old son, B., stepped outside to talk to Thompson. Thompson accused C.J. and S.L. of robbing him and stated that if his money was not returned "something [was] going to happen." Thompson then pulled out and fired a gun,

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hitting the house twice before leaving. A nearby family member recorded the license plate number for the car Thompson arrived in.

¶4 Based on the license plate number provided, police located the vehicle and initiated a high-risk stop. Thompson got out of the vehicle, ignored police officers' instructions, and began walking toward a nearby house. As he neared the house, he threw a gun onto the roof. Thompson then began complying with the officers' commands and was arrested.

¶5 Thompson was charged with two counts of discharging a firearm at a structure, two counts of kidnapping, two counts of aggravated assault, and misconduct involving weapons by a prohibited possessor. He was convicted on both counts of discharging a firearm, one count of aggravated assault, and one count of weapons misconduct. He was sentenced to enhanced, concurrent and consecutive prison terms totaling fifty-six years. We have jurisdiction over Thompson's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Evidence of Prior Act

¶6 Thompson first argues the trial court erred in allowing S.L. to testify that Thompson had pointed a gun at C.J. in the apartment complex's parking lot. He contends the testimony was not offered for a proper purpose pursuant to Rule 404(b), Ariz. R. Evid., and was unduly prejudicial. We view "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *quoting State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶7 Below, Thompson argued the evidence was inadmissible because it was irrelevant pursuant to Rule 402, Ariz. R. Evid., and that it was unduly prejudicial under Rule 403, Ariz. R. Evid. Thompson concedes on appeal that he did not raise his Rule 404(b) argument to the trial court and we therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does

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not preserve the issue [for appeal] on another ground.”). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). “To prevail on a claim of fundamental error, the [defendant] must first show error and then show that the error is fundamental and prejudicial.” *State v. Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d 770, 775 (App. 2009). We will affirm the trial court’s ruling if it was legally correct for any reason. *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002).

¶8 We review a trial court’s ruling on admission of other-act evidence for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007). Rule 404(b) provides that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.*; *see also State v. Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d 16, 23 (1999); *State v. Nordstrom*, 200 Ariz. 229, ¶¶ 62-65, 25 P.3d 717, 737-38 (2001) (evidence defendant possessed gun similar to that used several hours later to commit murder admissible to show identity and opportunity), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

¶9 According to S.L.’s testimony, Thompson became angry and pointed a gun at C.J. two to three hours before he arrived at S.L.’s home. Viewing the evidence in the light most favorable to the prosecution, *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518, this evidence tended to show that Thompson had a gun within a short amount of time before he arrived at S.L.’s home and therefore showed opportunity, *see Ariz. R. Evid. 404(b); Nordstrom*, 200 Ariz. 229, ¶ 65, 25 P.3d at 737-38.

¶10 Thompson contends, nevertheless, this testimony was “highly prejudicial, and inflammatory.” Even if relevant and admissible under Rule 404(b), other act evidence must undergo Rule

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403 analysis. *State v. Terrazas*, 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997). Relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of . . . unfair prejudice.” Ariz. R. Evid. 403. “Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Because “[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice . . . it has broad discretion in deciding the admissibility” of the evidence. *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

¶11 The trial court concluded that, under Rule 403, the probative value of S.L.’s testimony was not outweighed by the danger of unfair prejudice. The state was not able to conclusively prove that the gun Thompson was found with was the same gun used to fire at the trailer. Testimony that Thompson had a gun shortly before arriving at S.L.’s house was therefore probative on the issue of opportunity and did not have an undue tendency to suggest decision on an improper basis. *See Mott*, 187 Ariz. at 545, 931 P.2d at 1055.

¶12 Additionally, the fact that Thompson was acquitted on three of the counts demonstrates that the jury was not unduly prejudiced against him. Because the testimony was offered for a relevant and proper purpose, and was not unduly prejudicial, the trial court did not abuse its discretion in allowing it. *See Van Adams*, 194 Ariz. 408, ¶ 20, 984 P.2d at 23. Consequently, no error, fundamental or otherwise, occurred. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶13 Moreover, even if the trial court had erred in allowing the testimony, Thompson has not fulfilled his burden under fundamental error review to show the error caused him prejudice. *See Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d at 775. The court gave Thompson wide latitude to cross-examine S.L., particularly respecting her failure to tell police about the incident, and S.L.’s prior felony convictions were discussed on direct examination, fairly bringing her credibility into question. Additionally, several witnesses testified that Thompson had been speaking to B. and then

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fired a gun at the house, and police found Thompson with a gun later that evening. This evidence provided substantial evidence of guilt related to the charges of which he was convicted. *See State v. Naranjo*, 234 Ariz. 233, ¶ 64, 321 P.3d 398, 412 (2014) (no fundamental error in allowing inadmissible other-act evidence when state produced substantial evidence of guilt). Thompson has therefore not met his burden of demonstrating that any error caused him prejudice. *See Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d at 775.

¶14 Thompson also appears to argue the testimony was unnecessary and cumulative. He reasons that because B. testified that he had seen Thompson with a gun and police later found the gun on the roof, S.L.'s testimony was unnecessary to establish Thompson did, in fact, have a gun. However, the state "is entitled to introduce all relevant, probative evidence at its disposal" within the limits of the rules of evidence. *United States v. Burgess*, 576 F.3d 1078, 1099 (10th Cir. 2009); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 33, 124 P.3d 756, 767 (App. 2005) (relevant evidence admissible within bounds of United States Constitution, Arizona Constitution, and rules of evidence); *State v. Hall*, 136 Ariz. 219, 221, 665 P.2d 101, 103 (App. 1983) ("It is axiomatic that the burden is always on the state to prove all of the elements of the crime and the identity of the person who committed the crime beyond a reasonable doubt."). And Thompson has not provided any argument or legal authority that S.L.'s testimony was "needlessly cumulative." *See Ariz. R. Evid.* 403. Moreover, any error in admitting evidence that is merely cumulative is harmless. *State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) ("erroneous admission of evidence which was entirely cumulative constitute[s] harmless error"). Accordingly, this argument fails.

Sufficiency of Evidence for Aggravated Assault

¶15 Thompson next argues insufficient evidence supported his conviction for aggravated assault against B. because no evidence showed he had pointed the gun at B. or that B. had felt "threatened by [Thompson]" or "was placed in reasonable fear of injury or death." We review de novo whether sufficient evidence supported the conviction. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In doing so, "we view the evidence in the light most

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favorable to supporting the verdict and will reverse only if there is a complete absence of substantial evidence to support the conviction.’’ *Ramsey*, 211 Ariz. 529, ¶ 40, 124 P.3d at 769, *quoting State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). Evidence is “substantial if reasonable persons could differ on whether it establishes a fact in issue.” *Id.*

¶16 In relevant part, A.R.S. §§ 13-1203(A)(2) and 13-1204(A)(2) require the state to show that while using a “deadly weapon or dangerous instrument,” the defendant “[i]ntentionally plac[ed] another person in reasonable apprehension of imminent physical injury.” For a conviction of aggravated assault, the evidence need not establish the victim ever saw the deadly weapon; it is enough if the defendant commits the assault while he has “immediate control” of it. *State v. Torres*, 156 Ariz. 150, 152-53, 750 P.2d 908, 910-11 (App. 1988). The evidence shows these elements were met here.

¶17 Thompson approached S.L.’s home and confronted B. Although B. was not initially worried because he knew Thompson, after Thompson announced that “something [was] going to happen” if S.L. did not return his money, pulled out his gun, “rack[ed] the gun,” and pointed it at B.’s house, B. ran away because he did not “know if [Thompson] was going to shoot [him] or not.” B. further testified that once Thompson pulled out his gun and began shooting at his house, B. was “worried” and “scared,” and that B. was “afraid for [his] life.” Because the evidence plainly established Thompson had pulled a gun out and fired it in B.’s presence, making B. “afraid for [his] life,” sufficient evidence supported the verdict on this charge. Although Thompson argues no evidence established he had actually pointed the gun at B., that is not an element of the offense. See §§ 13-1203(A)(2) and 13-1204(A)(2); *Torres*, 156 Ariz. at 152-53, 750 P.2d at 910-11. To the extent Thompson argues B.’s testimony was conflicting, the jury was free to weigh the testimony and reach its own conclusion. See *State v. Cañez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002) (province of jury to weigh credibility of witnesses). Accordingly, his argument fails.

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Sentencing Error

¶18 Thompson lastly argues that he received an illegal sentence because the evidence did not establish his prior felony convictions were of a dangerous nature, although the trial court enhanced his sentences as though that fact had been proven.¹ He also argues that the state should now be prohibited from proving the dangerousness of his prior felony convictions under double jeopardy principles because it had two opportunities to do so, and failed both times.

¶19 The state concedes error, stating there was no “indication that the prior convictions . . . were dangerous offenses,” and therefore “the trial court’s decision to enhance [Thompson]’s sentences as if they were is without support.” The state urges us to remand for resentencing but argues that double jeopardy does not bar it “from proving that any (or all) of the prior convictions . . . are dangerous-nature offenses.” Thompson did not object to this sentencing error below, instead stipulating the sentencing ranges were correct and that the state had met its burden of proof. Our review is therefore limited to fundamental, prejudicial error. *See State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009). An illegal sentence constitutes fundamental, reversible error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶20 Based on the presumptive twenty-eight-year sentence he received for counts one and two, discharging a firearm at a structure, both class two felonies, it appears Thompson was sentenced pursuant to A.R.S. § 13-704(E). In order for a defendant to qualify for sentencing pursuant to § 13-704(E), the state must prove that he or she “has two or more historical prior felony

¹Thompson in his opening brief admits that one of his prior convictions was a dangerous offense. But the state does not argue that that admission should have any effect on our analysis. And although Thompson’s counsel admits that one of his aggravated assault convictions was dangerous, as we discuss below, the only evidence we have found of a prior dangerous conviction was for armed robbery. But that evidence was not admitted below.

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convictions . . . involving dangerous offenses.” A “dangerous offense” is one which involves “the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person.” A.R.S. § 13-105(13).

¶21 The only evidence the state submitted to prove Thompson’s prior convictions was a “pen pack,” which did not indicate whether his prior convictions for aggravated assault and armed robbery were of a dangerous nature. Those offenses can be committed under circumstances not making them dangerous offenses. *See* A.R.S. §§ 13-1204(A)(4)-(8), (10) (aggravated assault without requirement of use of deadly weapon or serious physical injury); 13-1904(A) (armed robbery can be committed with simulated deadly weapon). The record does contain an exhibit that was marked but not admitted, however, showing that one of Thompson’s convictions was, in fact, a dangerous offense. But the state did not move to admit this exhibit, and Thompson did not admit to the dangerousness of his prior convictions. Despite the deficiency in the evidence, the trial court utilized sentencing ranges for counts one and two that it could only have reached by finding at least two prior dangerous felony convictions. *See* § 13-704(E). Accordingly, insufficient evidence supported sentencing Thompson within the ranges the court used for counts one and two. We therefore vacate his sentences for those counts.

¶22 On count five, aggravated assault, based on the presumptive, twenty-eight-year sentence Thompson received, it appears he was sentenced pursuant to A.R.S. § 13-705(D). Section 13-705(D) imposes a presumptive sentence of twenty-eight years for those convicted of dangerous crimes against children when they have “been previously convicted of one predicate felony.” The statute defines a “predicate felony,” as relevant here, as one “involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.” § 13-705(P)(2). Although the “pen pack” the state submitted did not indicate whether any of Thompson’s prior convictions were predicate felonies, as noted above, the record contains a marked but not admitted exhibit showing that his armed robbery conviction was classified as a

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“dangerous” offense. But in the absence of the exhibit’s admission, the trial court could not consider it. *See State v. Prince*, 204 Ariz. 156, ¶ 23, 61 P.3d 450, 455 (2003) (jury must determine guilt or innocence “based only on admitted evidence”). Without that exhibit, no evidence showed whether the factual predicate for any of his convictions included “the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument” required to constitute a “predicate felony” under § 13-705(D) and (P)(2). The trial court therefore lacked sufficient evidence to find Thompson had been previously convicted of a dangerous offense. And Thompson need not show the absence of a predicate felony in order to show prejudice. *Cf. State v. Morales*, 215 Ariz. 59, ¶ 12, 157 P.3d 479, 482 (2007). The court thus erred in sentencing Thompson under the enhanced provisions of § 13-705(D). We therefore also vacate this sentence and remand for resentencing on counts one, two, and five.

¶23 Thompson argues that the state should be prevented from attempting to prove the dangerous nature of any of the offenses submitted in the “pen pack” on remand due to double jeopardy principles. But as the state points out, the United States Supreme Court has held that “the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context.” *Monge v. California*, 524 U.S. 721, 734 (1998). Our supreme court has also permitted a retrial on a prior conviction when the state did not meet its burden of proof. *See State v. McGuire*, 113 Ariz. 372, 374-75, 555 P.2d 330, 332-33 (1976). Thompson provides no argument for why the general rule of law as announced in *Monge* would prevent the state from taking full advantage of the opportunity for a retrial on prior convictions, or why this court should interpret Arizona’s double jeopardy clause differently than the federal provision. And he offers no authority for his assertion that because “the state never disclosed any evidence in support of its enhancement allegations” and “the state already elected to proceed with sentencing under the statutory provisions for dangerous offenses” it should be precluded on remand from introducing additional evidence or requesting a different sentencing framework. Accordingly, he has waived this argument on appeal. *See State v. Hardy*, 230 Ariz. 281, n.3, 283 P.3d 12, 16 n.3 (2012) (court limits

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review to arguments supported by authority); Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include argument stating party's contentions, "and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

Disposition

¶24 For the foregoing reasons, we affirm Thompson's convictions, and his sentence on count seven, but vacate his sentences on counts one, two, and five and remand for resentencing.